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How Does International Law Condition Responses to Conflict and Negotiation?

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Abstract

This article explores the role law plays in defining conflict and its consequences. Two elements of law's categorisations are critical; first law's cataloguing of activities fixing actions into particular classifications and second law's choosing of temporal points from which to analyse conflict, looking both forward and backward at events. The article uses two case studies to demonstrate these two features; Rwanda and Ukraine. Both examples, one historical the other contemporary, are replete with examples of law's categorisations of events and temporal points while demonstrating the tremendous impact that these choices have upon our understanding of how negotiations ought to proceed. This article does not call for a withdrawal of law from these situations but rather cognisance that heavy reliance on law can serve to mask both events and actors critical to successful negotiation and parties must bare this in mind when dealing with conflict.

Policy Implications

1. The consequences of law's expansion into all areas of conflict and negotiation ought to be reconsidered;
2. Reliance on law's account of events may not necessarily serve the end of achieving a negotiated end to conflict;
3. Decision-makers should seek to question what law's narrative omits through its classifications.

1. Introduction

The enterprise of producing "good" lawyers and indeed good international lawyers revolves around investing students with the ability to evaluate events according to a pre-ordained set of tools. Almost by instinct lawyers, no matter what their legal tradition, understand events through a consistent frame. Lawyers, both academic and practitioner, categorise, define and set forth advice based on concepts of reasonableness, proportionality, necessity and most critically, a law-based categorisation of events even in the most political of contexts. Of course, legal and political theory from positivist, critical or cosmopolitanism perspectives have explored the many inherent contradictions involved in this form of reasoning (Kennedy, 1987; Marks, 2006; Posner, 2009). Nonetheless this is the frame students are taught to engage with, no matter what the legal genre. Arguably this is never more apparent than when lawyers set about considering violence and conflict as law seeks to look both backward to understand causes and identify culprits and forward to offer resolution and pathways to peace. This paper

considers how individual states and international organisations respond to on-going violence or conflict when viewed through the prism of law. In particular, this article questions the decision points at which law looks back and forward as well as the impact this has on our understanding of conflict and negotiation. Picking the starting point matters as it is from here we adjudge claims, both legal and political, and thus make a variety of demands upon negotiation.

The paper explores the extent to which categorisations and temporal points are used to depict events leading to negotiation and asks whether strict legal approaches result in an entrenchment of oppositional narratives. In examining two conflicts, Rwanda and Uganda, the article seeks to demonstrate the variety of categorisations used by law to differentiate between events including what is and what is not a conflict, which actors are involved and how and why conflicts begin and end. These two examples demonstrate that current international legal practice in choosing temporal moments and categorisations of events can be detrimental to uncovering hidden narratives and lead to the hampering of processes of political negotiation. The illogicality of some international legal rules are obvious, though their underlying rationales are also important to law's operative foundation. Certainty in law, and particularly international law, empowers some to predict what law entitles and enables actors to do. Yet, Ukraine and Rwanda epitomise how such claims can be entirely predicated upon choosing one moment as of critical import to law.

2. Law's Categorisation

An initial legal ordering between the initial use of force and international humanitarian law leads to a particular understanding of why and how conflict occurs but other categorisations are equally relevant including; how violence is defined, determining when violence becomes conflict and whether armed conflict is 'internal' or 'internationalised'. Each of these categorisations in turn sets the parameters of negotiations between parties. They will dictate which parties are present and what legal regimes are applied. They dictate what is visible in the negotiation process as well as what is invisible. These categorisations dictate who is considered legitimate and a necessary negotiating partner, as well as defining the temporal scope of the 'conflict'. As such the categorisations have both a substantive and temporal effect on how lawyers deal with violent conflict and the negotiations that follow. As the march toward ever increasing legality continues it is imperative that law does not come to colonise questions that it should share with politics. Lawfare demonstrates the utilisation of law as both a legitimating factor and a weapon against an opponent nonetheless there remains a question about law's fundamental operation that is apart from its instrumentalisation (Dunlap, 2008). For international law the initial framing inquiry is whether violence can be said to constitute an armed conflict, or is simply a series of violent low-level events that ought to be left to regular policing.

These questions typically centre first on whether a necessary threshold of force has been passed, and second on who is engaged in the violence. International legal classifications

divide conflict into 'international', 'internal', or 'internationalised' conflicts. The rules that are applicable, as well as the parties subject to the law vary depending on this categorisation. The potential scope for international intervention, both during and after the conflict, depend on this categorisation. For example whether the conflict is deemed to impact on international peace and security, or whether it invokes the legal Responsibility to Protect will depend on the categorisation of the conflict and the label that parties, both external and internal, apply to it. Similarly the categorisation of the conflict will determine the applicability of the rules of international humanitarian law, and the ultimate accountability for the conduct of the conflict. For example is there a violation of international human rights law, a crime of aggression, does the International Criminal Court have jurisdiction, is there an issue of peremptory norm violation. This scene setting classification determines how all other categorisations unfold. Thus, when is internal violence merely a matter of domestic criminal law and policing action, even if it involves the military, and what elevates it into an internal armed conflict? Each of these questions leads down a particular path that shapes our understanding of what is happening often to the detriment of alternative paths of legal, or other, investigation. For those seeking intervention the focus on the humanitarian dimension of the conflict and the creation or reiteration of legal fictions whilst professing to not create 'precedent' is a consistent clarion. Of course this first assumes a very particular understanding of violence that most often results in the exclusion of economic or social violence as well as the systemic violence to which women are subject. It also leads to notable silences in respect of violence. States have recently become fond of stating that the actions of terrorists are purely criminal acts and thus not open to further international legal scrutiny. Therefore the question of who is involved in violence and why is also a constant factor in categorising conflict, whether explicitly or implicitly.

However it is suggested here that violence should be understood in its broadest sense to incorporate economic violence including disregard of economic and social rights, widespread corruption, the plunder of natural resources and extreme austerity measures that lead to protest and conflict and as well as physical violence that leads to injury and death amongst the general population within a country (Sharp, 2013). By conflict this paper utilises its legal conception. Thus a conflict occurs where a state of violence is reached the threshold that either an internal armed conflict can be said to be happening, or it goes beyond mere border instances between states. Such a definition specifically excludes the wars on terror or drugs or any other rhetorical approach rather focusing on the intensity of violence which may ultimately include events that lead from campaigns against terrorism or drugs (Akende, 2012). Of course this definition is problematic. Law struggles to define the intensity of violence that falls just below this rather opaque threshold, particularly in its economic form, which leads to the exclusion of incidences where basic human rights are systematically violated. These exclusions demonstrate how inadequate the law is by itself in understanding violence, conflict and negotiation.

3. Case Studies

This article uses two examples, Rwanda and Ukraine to consider what the standard international legal arguments reveal about how we regard ongoing violence. The article considers what the law does or does not do in each of these scenarios and what solutions law proffers as a result of its classifications. These two examples are chosen to demonstrate the variety of options within law for those who seek to negotiate an end to conflict. The Rwandan genocide is now at such a historical distance that law's interaction can more clearly be demarcated. Ukraine as a contemporary conflict proffers alternate narratives of how, through the same legal prism, we understand that conflict. Both conflicts share a number of actors but the differing responses amongst them, arguably following particular legal categorisation, produces differing agents and forms for negotiation, demonstrating the discretion permissible though rarely admitted to by lawyers.

a. Rwanda

The 1994 events in Rwanda have been repeatedly discussed however these accounts are worth reconsidering as they demonstrate the pervasive forms of categorisation as well as what is captured by law and what is, at times, purposively ignored. The genocide is widely characterised in an oversimplified narrative of violence between two competing ethnic groups, to which the international community was little more than a helpless bystander. It is an often cited example of the equivocal approach of the international community to international law, and in particular of the limits of international law in responding to an internal conflict. However deeper analysis reveals a much more complicated picture of law and politics in the years preceding the genocide, one which a legal narrative fails to adequately capture.

When genocide against the Tutsi began UN peacekeepers, alongside other international organisations such as the IMF and World Bank, were heavily engaged in Rwandan governance.ⁱ The presence of international organisations, following several Security Council and OAU interventions, was on the invitation of the Rwandan Government, to ensure the implementation of the Arusha Agreement.ⁱⁱ Thus the genocide began in a post-conflict and negotiation scenario. When the plane of President Habyarimana was shot down and conflict re-erupted leading to genocide UN peacekeepers were in attendance to witness and report the violence as it unfolded and indeed to seek assistance.ⁱⁱⁱ The failure to provide the requested support is well documented and acknowledged by the UN although in a rather limited temporal understanding of events,^{iv} one which isolates the immediate period during which the genocide occurred and excludes the preceding context. When UN assistance first arrived it was to assist in the removal of foreigners rather than the protection of Rwandans.^v Whilst the genocide continued for a considerable period there was little new intervention to prevent or stop the violence albeit there were debates resulting in UN Secretary General Reports and Security Council Resolutions. The genocide ended when the RPF, acting out of Ugandan territory, took control of the state and ended the violence.

Rwanda's genocide is full of examples of legal definitions and categorisations having a significant impact on how we build both the narrative of what occurred but also how we regard the decisions which were made during negotiations. First, to look at what was subsequently omitted from the dominant legal narratives. The decision of the Security Council eventually to employ the term genocide is itself a decision to deploy legal categorisations. Its delayed invocation derived from a fear of what is expected of states and international organisations, both politically and legally, once they know or ought to know genocide is occurring (Straus 2005). In this way international law and the obligations it entailed framed the actions of the Security Council in respect of intervention. The partial internationalising of the conflict from the RPF bases in Uganda or the presence of international actors was all but ignored as Rwanda was consistently considered an internal conflict and subsequent categorisations maintained this legal tagging. Similarly the Arusha Agreement formed part of a negotiated settlement signed by the major parties. The presence of peacekeepers to bring an end to an existing conflict rather than to engage or end violence which was "new" was an essential feature of the Agreement. As the Agreement had categorised the conflict as resolved, violence occurring outside the temporal scope of conflict as framed in the Agreement was not visible in the narrative of the peacekeeping mission. Finally, whilst, the failure to intervene militarily to stop the genocide and the lack of willingness by the "international community" to use the tools open to it under Chapter VII of the Charter seems to be the main lesson learned this is not examined in the context of the long engagement by external actors in Rwanda but rather is isolated as a period of exceptional violence that was unrelated to the existing international intervention.

Regarding the Arusha Agreement as a negotiated settlement beyond the Tutsi and Hutu groups re-orientates our view to broaden the temporal understanding of events but also to include a broader array of actors. As part of this negotiation the then Rwandan Hutu Government accepted strict IMF and World Bank led policies, largely conforming to the Washington Consensus, in order to receive funds to keep the country operating (Storey, 2001; Anderson, 2000). Thus Rwanda began to open its economy to foreign direct investment and to undertake a programme of austerity. The conditionality imposed by both the IMF and World Bank Group led to much internal dissatisfaction and hardship, yet this form of economic intervention does not come under the categorisation of violence or conflict which lawyers utilise nor is part of the narrative that underpins the economic hardship which contributed to the mutual suspicion building within the country (Orford, 2001).

Rwanda's classification as an internal conflict combined with Arusha Agreement designation as resolving a former conflict was fundamental to the reactions which followed. The creation of the first Hutu led Government in Burundi and the assassination of President Ndadaye which resulted in mass killings of Tutsis within that territory fails to feature in how the violence in Rwanda was understood before or during the genocide or in the transition which followed.^{vi} Issues stemming from the colonial period (France was still heavily engaged in region as well as others such as the UK and the USA) in Rwanda, Uganda and Burundi, and their historic divisions further contributed to tensions albeit international law remains determined that steadfast territorial boundaries are essential to peace.^{vii} For the law it was an

internal armed conflict and while the Arusha negotiations did engage these states the categorisations of the conflict masked the much broader implications of what was occurring in each country and stood beyond law's ability to catalogue what was necessary for negotiations.

Clear legal invocations both during and subsequent to the genocide were the direct result of international inaction. The subsequent creation of the ICTR was the Security Council's eventual Chapter VII attempt to legally account for the genocide once it had ended and seeming stability, mirroring the Arusha Agreement, created. Albeit its concern was internal to Rwanda again not looking to all the actors involved before, during and after the genocide.^{viii} The ultimate legal intervention, the ICTR, is probably as lawyerly as is possible to be where violence has occurred. Individual criminal responsibility categorises our perception of what happens and who was responsible for events by-passing other narratives that may be essential when setting about negotiations. The lack of action or intervention during the genocide is often cited as the rationale for the creation of Responsibility to Protect (Stahn, 2007).^{ix} Responsibility to Protect emerges from an understanding of military or humanitarian intervention rather than recognising that the ongoing interventions, by a variety of international actors, had contributed to the circumstances in which genocide occurred.

Economic interventions by states and international organisations, the presence of peacekeepers, the colonial legacy, and the nature of Hutu/Tutsi relations across several states are left un-captured by both the understanding of what happened in Rwanda but also the development of Responsibility to Protect. Whilst the soon to be enforced crime of aggression goes some way to recognising that events go beyond the individual the legal response did not call into question the multiple actors involved in the descent into genocide instead law looked only as far back as the President's death and as far forward as individual criminal responsibility thus leaving but a partial account of events in Rwanda.

b. Ukraine

As a contemporary conflict Ukraine has yet to be subject to extended analysis. The Orange Revolution's mass protests and the Supreme Court's overturning of elections resulted in little change with Viktor Yanukovich returning to power until he fled to Russia in 2014. Ongoing low-level violence including the imprisonment of opposition politicians led to increasing protest and violent state reactions. In 2013 protests concerning Ukraine's relationships with its immediate largest neighbours, the EU and Russia, led to constitutional crises. Following the departure of Yanukovich, Crimea, Donetsk and Luhansk began to agitate to succeed. Crimea, following military action by Russia and a hastily held referendum succeeded and joined Russia. The conflict continues in the east of the country with intermittent ceasefires interspersing violence. However the conflict is represented as one over rights of self determination and minority rights and protections, thus bringing it within the framework of international law and the protection of civil and political rights.

It is critical to understand what is currently omitted from the narrative. Ukrainian economic choices formed an important element of the descent into conflict with protesters objecting to the decision of President Yanukovych to abandon an Association Agreement with the EU and in its stead sign an Agreement with Russia. The EU Agreement was ultimately signed in 2014.^x The Ukrainian economy remains crippled and active only through EU, US and IMF support albeit with austerity measures imposed through conditionality.^{xi} The eastern breakaway regions and Crimea are equally dependent on Russia, itself having economic woes following the imposition of sanctions and the drop in oil prices. Ukrainian debates on these economic and political choices were matched by external pressure from both the EU and Russia. The forms of economic and political coercion, aside from threats of the use of force and sanctions, casts doubt on the notion of consent based sovereign equality under the UN Charter and how we characterise the choices available to states.^{xii} Certainly the choices that Ukraine had with regard to these treaties could hardly be claimed to be without economic compulsion, in the form of market access, fuel access and financial support, and indeed, as it ultimately played out, the use of military force.

Ukraine, since independence, has continuously been in negotiation with outside forces to the extent that its initial act to give up its nuclear weapons in exchange for a guarantee of its borders and freedom from economic coercion seems foolhardy.^{xiii} Indeed the Budapest Memorandum is an outright acknowledgement that without nuclear weapons Ukraine needed its neighbours to pledge that they would not use force or economic coercion to influence its actions. The catalyst for the current violence, an international treaty with either the EU or a doppelganger with Russia, was a clear choice between two forms of international actor becoming involved within Ukraine. While the EU option offered a multilateral partnership, Russia provided secure energy supplies and financial support. Both options were to the exclusion of the other. Arguably, the choice of treaty arrangement put Ukraine in an almost impossible position, legally binding itself to one powerful neighbour or the other was never going to appease either. Whilst international law may claim that Article 2.4 of the Charter guarantees the sovereign equality of states and the Budapest Memorandum guaranteed a life without coercion all of these elements are paradigmatic of international order that regards conflict and violence through a very particular prism and often omits the context from its understanding of negotiation.

Ukraine is oft regarded as an internal conflict whose internationalisation depends upon the nature of Russia's military intervention, the annexation of Crimea, and Russia's activities in Eastern Ukraine. With intermittent political and economic violence coupled with various forms of negotiation involving a plethora of internal and external actors resulting in treaties, guarantees and assurances but much of the violence and its causes eludes law's gaze. Yet, counter-intuitively perhaps and especially at the outset, negotiations took place either without Ukrainian representation or with these actors largely sidelined, as such, settling an apparently internal conflict without domestic negotiators.

Yet, other events have made their way into law's vision of how negotiations should proceed. President Yanukovych's eventual step-down is a good example of law's use to legitimise

subsequent action. Thus, whether outside forces regard Yanukovych as removed by illegitimate forces, impeached by the Ukrainian Parliament or in a coup affects subsequent elections organised by Kiev and in the various breakaway regions. The UK Foreign Secretary, mirroring the EU's view, insisted that Yanukovych's removal was legitimate and in accordance with the Ukrainian Constitution whilst Russia denied this possibility.^{xiv} The acceptance of the constitutional legitimacy of this act centres the EU's rhetoric in recognising the subsequent Kiev led elections whilst not recognising the voting-based activities in other regions. That the legal legitimacy lies with Kiev as a question of internal Ukrainian law is assumed by the EU rather than questioned.

Russia engages a variety of legal categorisations; its bi-lateral agreement to hold military bases in Crimea, an obligation to protect Russians or Russian speakers within breakaway regions as well as the areas' historic "Russianness." Whilst Russia does not claim a right of humanitarian intervention it is, much as it did in South Ossetia and Abkhazia, at a minimum arguing for the right to protect nationals abroad. Regarding Crimea, Russia makes several historic legal claims, that it was always part of Russia, that Soviet Leader Khrushchev "gave" it to Ukraine whilst drunk thus seeking to delegitimise the internal re-ordering of borders in the Soviet era, the contested agreement as to NATO expansion, or the irrelevance of the 1774 Treaty of Küçük Kaynarca with the Ottoman Empire. The notion of Ukrainian Rus together with the mythologisation of an indistinct point in history and the existence of a nation has played a central role in Russia's arguments. Indeed in harking back to the Ukrainian Rus, Russia is invoking a 'bordered' nation state that never existed but seeks to categorise its actions as a form of self-determination rather than the sacrosanct nature of borders that, as in Rwanda, international law promotes. The sanctions introduced by the EU and the US are also of a curious character; states not wanting to violate trade rules, not able to use the Security Council and left with a situation where self-defence without Ukraine asking for intervention leaves few options. Whilst the West has had some success with sanctions these have not been of real benefit to Ukraine.

As Russian troops left their treaty bases and Crimea held its referendum to succeed from Ukraine the narrative of self-determination and succession became significant. After holding referenda and elections, Crimea alongside the Donetsk and Luhansk successions, appear to fall short of the standards of the legitimate exercise of self-determination, yet there is uncertainty in how groups may carry through their will (Sterio, 2013). Whilst the methods of succession within international law are unsettled what made these referenda illegitimate, according to the EU and US, was the haste in which they were held, the intimidation which accompanied them and the impact upon minorities such as the Tatars. Whilst these critiques are valid the same legal tests were not put to the actors in Kiev nor did the EU or US set terms on how self-determination may be otherwise accomplished. Various examples, from Kosovo to South Ossetia and Abkhazia are proffered depending on what legal category actors wish the breakaway regions to sit within. While Russia consistently opposed Kosovo's independence most European states have recognised its statehood with the opposite outcome for South Ossetia and Abkhazia. Whilst there are differences between all of these regions the lack of coherence within the law of succession and in the recognition of new states has left

various parties claiming differing independence positions and the right to be legitimate representatives at negotiation.

In many ways events have all but stopped being about Ukraine and rather become a confrontation between Russia and the West with discussions of a new Cold War abounding and the Ukrainians themselves becoming side-lined. Legal categorisations are everywhere in Ukraine, from Yanukovych removal, the nature of policing protests, the right to self-determination, the character of referenda, the right or otherwise of parties to be present at negotiations, the characterisation of military intervention to the internationalisation of conflict. Whether law has provided any guidance through the complicated escalation of violence is debatable whereas its instrumentalisation - even when the invocation is clearly inaccurate or blinkered - is present. Whilst the ever-increasing use of legal argument in the post Charter era has often been depicted as positive Ukraine provides a clear example of where the legal categorisation of events masks political claims making negotiation more difficult.

4. Conclusion

The paper questions how we engage law when tackling violence and conflict and, in turn, how this impacts upon negotiations, before descent into violence, during the conflict and in its aftermath. Both Rwanda and Ukraine abound with examples of how we categorise events and the points at which the law chooses to look forward and backward that, in turn, impact tremendously on how negotiations proceed. Juridification has advanced at full pelt over the past decades resulting in some important successes but this paper queries whether law's categorisations of key events and temporal determinations have become a burden upon negotiation.

Rwanda demonstrates that in focusing on one event, the genocide, law neglects the failures of the previous negotiations or the multitude of international actors that remain ever present. Whilst Ukraine demonstrates that law as a legitimating source for rhetoric has been as much a tool of propaganda for parties choosing their tactics as it is a device for resolving the conflict. These outcomes are not based on the indeterminate character of law but rather on conflict, violence and negotiation's political character and the potential for supplanting political engagement with law. If law supplants all else it only serves to mask narratives rather than providing an elucidating force. When strict legal delineations entrench particular narratives over others they cloak both actions and actors. The consequences of this upon the ultimate satisfactory character of any negotiation should be recognised. This is not a call to abandon law but rather a recognition that law, in looking forward and backward from a single temporal point, can only provide partial solutions and truths and that over reliance on law's framing of conflict may lead to conflict's perpetuation rather than its successful negotiation.

ⁱ Details on UNAMIR can be found here, <http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm>

ⁱⁱ Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 1993, Security Council Resolution 812 Rwanda (12 March 1993), Security Council Resolution Rwanda 846 (22

June 1993), Security Council Resolution Rwanda 872 (5 October 1993), Security Council Resolution on extension of the mandate of the UN Assistance Mission for Rwanda and implementation of the Arusha Peace Agreement 909 (5 April 1994)

ⁱⁱⁱ Security Council Resolution 912 on adjustment of the mandate of the UN Assistance Mission for Rwanda due to the current situation in Rwanda and settlement of the Rwandan conflict (21 April 1994) Security Council Resolution 935 requesting the Secretary-General to establish a Commission of Experts to examine violations of international humanitarian law committed in Rwanda (1 July 1994)

^{iv} Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda, (15 December 1999) UN Doc. S/1999/1257

^v Security Council Resolution 918 on the expansion of the mandate of the UN Assistance Mission for Rwanda and imposition of an arms embargo on Rwanda (5 April 1994)

^{vi} International Commission of Inquiry established under resolution 1012 (1995) concerning Burundi

^{vii} Constitutive Act of the African Union, Article 3 (b), UN Charter, Article 2 (4)

^{viii} Security Council Resolution 955 International Criminal Tribunal for Rwanda (8 November 1994)

^{ix} Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect, VII,

^x http://eeas.europa.eu/ukraine/docs/association_agreement_ukraine_2014_en.pdf

^{xi} <https://www.imf.org/external/pubs/ft/survey/so/2014/car090214a.htm>

^{xii} Article 52 VCLT

^{xiii} Budapest Memorandum on Security Assurances

^{xiv} <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-ukraine-syria-and-iran>

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